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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE ASSOCIATED PRESS,

Petitioner,

v.

CHARLES J. BUFALINO, JR.,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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(i)

RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

This libel case involves certain news stories published by The Associated Press disclosing contributions to Governor Thornburgh's election campaign. Governor had run a successful election campaign on a reform platform. The stories disclosed that individuals with alleged mob ties were among the contributors to that campaign.

Respondent, Charles J. Bufalino, Jr., a highly reputable attorney from the small community of West Pittston, Pennsylvania, was among those alleged to have mob ties. Respondent was identified as a relative of Russell Bufalino, a notorious underworld figure who is a convicted felon.

The reporter who wrote the story relied solely on the information provided by two reporters in the vicinity of West Pittston, respondent's community, as to the fact that Charles Bufalino and Russell Bufalino were related. The reporter checked with certain sources in the employ of the Pennsylvania Crime Commission, who confirmed the familial relationship and added that respondent had represented as an attorney certain individuals suspected of involvement in organized crime.

This was the total of the reporter's information on which he based the damaging story. Less than two weeks later The Associated Press circulated a corrective, withdrawing the allegation of family relationship, but not the allegation of mob ties.

After the case was filed, and following a broad and frantic search by petitioner, it appeared that there existed certain decades-old reports that suggested a relationship between respondent and Russell Bufalino. Also it emerged

(ii)

that respondent was Borough Solicitor for West Pittston, an appointive part-time office, and functioned solely by providing legal advice to the Borough Council. The investigation also disclosed that respondent, as a private attorney, had represented certain people who were suspected of being involved in criminal activities.

The District Court granted summary judgment based on these facts on the basis of the Pennsylvania fair report privilege and on the basis of the *New York Times v. Sullivan* rule. The Court of Appeals for the Second Circuit reversed on the basis that the reporter did not rely on the privilege, and on the basis that respondent was not identified as a public official in the news stories that defamed him.

The defense of truth is not involved in these proceedings.

As against this background, the questions presented by respondent are:

1. Is every small-town, part-time appointed public official within the scope of the *New York Times v. Sullivan* rule in the absence of a showing that he has any influence on policy or governmental matters and where his function is limited solely to providing legal advice?

2. May the *New York Times v. Sullivan* rule apply under the circumstances set out in the preceding question where the lawyer's part-time public official role is not mentioned in the libelous publication, is unknown to the defendant at the time of publication, and is not generally known in the community?

3. May an oral disclosure by a lower level official who insists on remaining anonymous be characterized as an official report of the agency employing such official for First Amendment purposes?

(iii)

4. Whether this Court wants to become involved in a matter that is, in essence, an appeal to the Supreme Court from a denial of summary judgment to a litigant?

TABLE OF CONTENTS

| | |
|--|----|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| STATEMENTS OF FACTS | 1 |
| ARGUMENT: | |
| I. This Case is Not In Appropriate Posture for Review by This Court | 6 |
| II. The Significance of an Alleged Family Relationship is Not an Appropriate Issue for This Court | 9 |
| CONCLUSION | 11 |

TABLE OF AUTHORITIES

Cases:

| | |
|---|---|
| <i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) | 8 |
| <i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1979). | 6 |
| <i>Phillips v. Evening Star Newspaper Co.</i> , 424 A.2d 78 (D.C. App. 1980) | 8 |
| <i>Wolston v. Reader's Digest Assn., Inc.</i> , 443 U.S. 157 (1979). | 6 |

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STATEMENT OF FACTS

Respondent Charles J. Bufalino, Jr. is an attorney practicing law in his native town of West Pittston, Pennsylvania, where his father had also been an attorney in private practice. West Pittston is in eastern Pennsylvania, in the vicinity of Scranton and Wilkes-Barre, and is a Borough populated by about 8,000 residents. West Pittston is a former coal mining area, and many of its residents are of Italian ancestry.

There is substantial evidence in the Court below that respondent is highly regarded in his community as an individual of good moral character as to both his public and private life, and a civic leader and a most reputable member of his community.

On December 8, 1978 there appeared a news item in a local daily newspaper, the Scranton Times, identified as having originated with petitioner The Associated Press, as follows in pertinent excerpt:

Backer's List Surprises Thornburgh -

Harrisburg (AP)—Governor-elect Richard L. Thornburgh, who rose to fame by battling organized crime, accepted political contributions from several individuals with alleged mob ties, according to his campaign records . . .

Among the 14,000 contributors listed by Thornburgh were:

. . . Charles J. Bufalino, Jr., an attorney who is related to Russell Bufalino, described by the Crime Commission as a Mafia boss. He gave \$120.00.

Rewrites of this same news story appeared during the next several days in the Scranton Times and the Wilkes-Barre Times Leader Evening News, both newspapers of general circulation in the West Pittston area, excerpts of which are as follows:

Thornburgh Plans Fund Return to 3

Harrisburg (AP)—Governor-elect Richard L. Thornburgh will return campaign contributions to three individuals who allegedly have ties to organized crime figures . . . "we are looking into whether Bufalino has documentable links to organized crime but as of today we have been unable to determine that

Bufalino, an attorney, is related to Russell Bufalino, identified by state and federal agencies as a Mafia boss now in prison"

It is noted that the stories made no reference to respondent occupying a public office, and that the phrase "documentable links to organized crime" states the understanding of Governor-elect Thornburgh's staff as to the intendment or thrust of the news articles.

About two weeks later, and under date of December 21, 1978, The Associated Press published a so-called corrective as follows:

"Associated Press reported erroneously on December 8 that Charles Bufalino, Jr. was related to Russell Bufalino, who had been identified by the Pennsylvania Crime Commission as an organized crime leader in northeastern Pennsylvania.

The error appeared in a story about disclosure of campaign contributions by Governor-elect Thornburgh and Democratic candidate Peter F. Flaherty.

Two members of the Crime Commission staff had said that the Bufalinos were related.

There is no evidence that Charles and Russell Bufalino are related."

It is noted that the so-called "corrective" of December 21, 1978 did not retract the "mob ties" allegations of the earlier news stories. These news stories were transmitted by petitioner to all of their member-subscribers in Pennsylvania, comprising the major newspapers within the state.

Being deeply offended by the defamation explicitly set out in the dispatches of The Associated Press, respondent filed this diversity action for libel against petitioner in the United States District Court for the Southern District of New York.

Pre-trial discovery together with a massive investigation by The Associated Press disclosed the following facts, all of which are of record in the proceedings below:

1. There is another Bufalino family that has lived in the Scranton-Wilkes-Barre area, unrelated to respondent's family. A member of that family, Russell Bufalino, has acquired considerable notoriety as an organized crime figure. Russell Bufalino is a convicted felon.

2. The stories in issue were prepared by a reporter in petitioner's employ named Paul Carpenter. At the time the stories were written and transmitted Carpenter had little, if any, knowledge about respondent. He testified that he wrote the offensive news stories based on two facts: (a) That respondent was related to Russell Bufalino, although the nature of the claimed relationship was not disclosed, and (b) that respondent had, in the past, represented as an attorney some clients believed by the Pennsylvania Crime Commission to have been involved in organized crime. According to Carpenter, these two "facts" were sufficient to justify the allegation of mob ties.

The above two facts represented the total of Carpenter's knowledge concerning respondent.

3. Carpenter invoked the provisions of the Pennsylvania Shield Law in refusing to disclose the identity of his informants with the Pennsylvania Crime Commission, as they had allegedly requested to remain anonymous. Carpenter described his informants as "officials," which would apparently include a large category of Crime Commission personnel.

4. The Pennsylvania Crime Commission publishes an official report each year, disclosing the results of their investigative efforts. Respondent has never been mentioned in such official reports.

5. Insofar as the alleged family relationship is concerned, there had been confusion before in certain records as to Russell Bufalino's relatives. The report of an FBI interview with Russell Bufalino while the latter was in custody containing erroneous information was introduced and relied upon by petitioner below. This record is in the nature of a "raw file" of the FBI. Respondent submitted below a carefully constructed genealogy chart that demonstrates the lack of any familial relationship as between Russell Bufalino and respondent. This, together with the corrective" retraction above noted, places the relationship issue in controversy below.

More importantly, the reporter Carpenter was unaware of the existence of such older records, such as they are, when he wrote his news stories.

6. In addition to his law practice which provides his livelihood, respondent is Borough Solicitor for West Pittston. This is a part-time, appointive position, from which respondent is paid about \$3,500 per year. Respondent's activities in this regard are limited to providing legal advice at Borough Council meetings, and on request from that body.

The record as to the precise nature of respondent's activities as Borough Solicitor was not well developed for the purpose of the summary judgment proceedings below. There is no evidence that respondent makes any contribution as Borough Solicitor other than providing legal advice on an as-needed basis. And, once again, petitioner's agents in the publication of the libelous news reports had no knowledge or awareness of respondent's professional services to the Borough Council of his community.

ARGUMENT

I.

THIS CASE IS NOT IN AN APPROPRIATE POSTURE FOR REVIEW BY THIS COURT.

The procedural status of the litigation is that following the District Court's granting of summary judgment such judgment has been reversed by the Court of Appeals. Therefore, the procedural posture is as if summary judgment had been denied, and the case was proceeding to trial. The decision of the Second Circuit is not final, it does not put an end to the litigation unless this Court grants the Petition for Writ of Certiorari.

This Court has had occasion to comment on the propriety of summary judgment in defamation proceedings on the issue of actual malice. *Hutchinson v. Proxmire*, 443 U.S. 111, 61 L.Ed.2d 411, 99 S.Ct. 2675 (1979) at 120, n. 9. This was also referenced in the case decided the same day, *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 61 L.Ed.2d 450, 99 S.Ct. 2701 (1979) at 161, n. 3.

Although this Court's admonitions in reference to the propriety of summary judgment cited above related to the malice issue in defamation cases, it appears on the record that summary judgment and the granting thereof by this Court by way of a reversal of the mandate of the Court of Appeals and the reinstatement of the Order of the District Court would also be most inappropriate. The fourth paragraph of the Court of Appeals decision reads as follows:

"Judge Werker assumed certain facts to be true in rendering summary judgment for the defendant. While plaintiff disputes some of these facts, we will also assume them to be true for purposes of

this appeal so that the correct legal standard may be established prior to trial. At trial plaintiff will be free to put his version of the facts to the trier. We therefore state the facts as follows."

Thus, should this Court grant the instant Petition and reverse the Court of Appeals on an issue of law predicated on assumed facts, respondent would have been denied the opportunity to have his version of the facts considered.

Indeed, the quoted excerpt strongly suggests that there was a separate and independent basis for the action of the Court of Appeals, namely, that the District Judge had acted improperly in deciding contested issues of material fact in summary judgment proceedings.

Among these contested issues is the existence of any report of official records and proceedings that would give rise to a viable claim of privilege that could be effectively asserted by petitioner. Despite the confusion in decades-old records concerning a family relationship, there is no official record or report of official proceedings that would justify the offensive charge of "mob ties" as to respondent.

Another contested issue is whether respondent has ever been referenced as a person of dubious moral character. Respondent offered cogent evidence as to this issue, tending to establish that he was a person of exemplary character. Petitioner on the other hand offered highly tenuous material on which it asked the Court below, and now asks this Court, to base a most uncertain set of conjectural inferences as to the effect that the public record, fairly interpreted, leads one to the conclusion that respondent is deserving of the description as one having mob ties.

Another contested issue is whether the off-the-record statement of an individual "official" whose desire to re-

main anonymous is respected, can ever be an official statement within the scope of the privilege. The Court of Appeals references to *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 89 (D.C.App. 1980), cert. denied, 451 U.S. 989 (1981) is most apposite, however petitioner would have this Court ignore this flaw in their claim of the fair report privilege. An unattributed statement by an official simply cannot be an official statement.

Respondent's role as an attorney in private practice and the calibre of his clientele cannot be used to impute dishonor to the attorney. Yet this is precisely what Carpenter, the AP reporter, did.

Respondent is not a "mouth piece" for the mob. His practice is that typical of an attorney in a small community. No doubt he has represented clients whose moral stature leaves something to be desired.

Chief Justice Burger in his dissent in *Gertz v. Welch*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974) provided current recognition to the truism that the character and reputation of a client is not to be imputed to his lawyer. As a policy matter, the representation by respondent of individuals suspected of involvement in organized criminal activities is irrelevant. A lawyer cannot be held to risk his reputation should he represent clients suspected of criminal misconduct.

From the above it will be recognized that to permit the proceeding to go forward in this Court in its present procedural posture would be, in effect, to involve this Court in summary judgment proceedings. What is required at this point is an orderly trial, where a trial judge and jury may do the sifting and fact finding that is conventional with rulings as to proffered evidence and instructions to a jury that would afford an appellate tri-

bunal the kind of record that is customary. Contests as to the credibility of witnesses and admissibility of documents are best left to the trier of the fact.

II.

THE SIGNIFICANCE OF AN ALLEGED FAMILY RELATIONSHIP IS NOT AN APPROPRIATE ISSUE FOR THIS COURT.

The District Court, in granting petitioner's motion for summary judgment relief upon decades old "official documents" in ruling that if petitioner had known of the existence of these "official documents" it would have been privileged to publish same in reporting a family relationship as between respondent and Russell Bufalino. The District Court then employed the same documents to justify petitioner's pejorative of mob ties.

Laying to one side the issue of a possible abuse of the fair report privilege, and assuming *arguendo* that even under these attenuated circumstances the fair report privilege would protect the attribution of a familial relationship, the question arises as to whether the family relationship allegation, no matter how erroneous, may be employed to support a charge of mob ties.

Apparently the District Judge assumed that the relationship could be so used. The Court of Appeals did not rule on the question for it held that the fact that these older documents were unknown to petitioner at the time of publication precluded the employ of the privilege to immunize the defamation.

Thus, a question as to the relevance of a family relationship to mob ties lies under the surface of these proceedings. Petitioner is impliedly asking the Court to recognize a connection between the two: The family

relationship (the nature of which is not disclosed) and a somewhat horrifying conclusion of mob ties.

In an attempt to illuminate the *non sequitur*, respondent submitted an affidavit to the effect that Russell Bufalino had a cousin who was a Roman Catholic priest and pastor of a church in Sicily. Does this mean that the media may justifiably accuse the priest of mob ties?

Petitioner's summary judgment can be reinstated only if the Court adopted an unprecedented taint-by-blood hypothesis. At least one highly placed official of The Associated Press rejects such hypothesis. In a recently published book, *The News Business*, by John Chancellor and Walter R. Mears, published in 1983 by Harper and Row the following admonition appears:

. . . The policies of news desks vary too. Those policies should protect the identities of people who might be endangered or victims who would be humiliated if names were used.

This applies to relatives of people in the news. The brother of a child molester leads a blameless life. His name and address don't belong in print. Put them there and he's harmed. *The News Business*, at 116.

Walter R. Mears is a Pulitzer Prize winner and is Vice President and Washington Bureau Chief of the Associated Press.

Petitioner has, in addition, submitted a pot-pourri of additional scraps of information gleaned from their post-complaint investigation. These items, which petitioner claims to support its position, rely on a guilt by association line of attack on respondent and were disregarded by the District Court. These elements are characterized by petitioner as establishing financial, family and social ties between appellant and others identified as participants in

organized crime. The Court of Appeals did not consider this material for the reason that they were not relied upon by the reporter. Respondent's position throughout has been that much of this material is inadmissible. There has been no ruling by any Court as to the relevance and probative value of this material.

At this point petitioner presses these matters in this Court. Procedurally, this is tantamount to asking this Court to become an original trier of the fact, sifting through evidentiary submissions to determine probative value.

CONCLUSION

It would seem that what is needed at this point is the sifting and disciplined process inherent in a trial of the action. The procedural posture and the non-availability of a record of testimony and documentary proof that has survived rigorous scrutiny makes Supreme Court review inappropriate. Respondent would be deprived of the opportunity to test the submissions of petitioner offered in defense were this Court to upset the determinations of

the Court of Appeals. Alternatively, petitioner is deprived of nothing, including a further opportunity to petition the Court after trial and appellate review.

For the foregoing reasons, respondent suggests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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